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U.S. Department of Transportation  
400 Seventh Street, S.W.  
Washington, D.C. 20590

**Qualification of Drivers; Exemption Applications; Vision  
Notice of Applications for Exemption from the Vision Standard  
66 Fed. Reg. 53826, October 24, 2001**

**Introduction**

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Motor Carrier Safety Administration (FMCSA) notice of applications for exemptions from the federal vision standard, title 49 Code of Federal Regulations (C.F.R.) § 391.41(b)(10). 66 Fed. Reg. 53826 *et seq.* (Oct. 24, 2001). Advocates does not comment on the merits of the individual applications or the specific qualifications of the 37 drivers except as necessary to exemplify problems in the quality and quantity of the information provided regarding the applications, the agency's presentation of the information to the public, and the process adopted by the agency for evaluating the petitions and for making determinations to grant or deny the exemptions.

Advocates files these comments for several purposes. We comment in order to: clarify the consistency of the exemption application information provided by FMCSA to the public; object to the agency's misplaced reliance on conclusions drawn from the vision waiver program; point out the inadequacies of the agency's procedures; address the agency's misinterpretation of existing law regarding the statutory standard governing exemption determinations; and place in the administrative record of this proceeding the pertinent portions of a ruling of the U.S. Supreme Court that directly bear on the legal validity of vision exemptions and the agency's exemption policy.

**The Federal Motor Carrier Safety Improvement Act of 1999**

More than 5,000 people have been killed annually over the past decade, on average, in commercial motor vehicle (CMV, or truck and bus) related crashes. While recent data indicate a slight downturn in total deaths over the past year or two, the fatality total has remained relatively steady over

the last 5 to 7 years. In addition, many tens of thousands of motor carriers are unrated by the FMCSA and timely information about operator violation and conviction records is poor. A number of crashes involving motor coaches in recent years, as well as the issuance of a proposed change in the driver hours-of-service regulations, has heightened awareness regarding motor carrier and operator safety. In addition, Congress expressed its concern for safety on our nation's highways and specifically determined that there is a need for new leadership and oversight in the regulation and stewardship of commercial motor vehicle operations. Toward that end, the Motor Carrier Safety Improvement Act of 1999, Pub. L.

106-159, 113 Stat. 1748 (Dec. 9, 1999) (hereinafter Safety Improvement Act or Act), was enacted to establish a new commercial vehicle safety agency, the FMCSA, within the U.S. Department of Transportation.

The Safety Improvement Act was intended to significantly enhance the oversight and safety of commercial motor vehicles. The Act created the FMCSA as an agency primarily, if not singularly, devoted to commercial motor carrier safety. The premise of the Act and the reason for establishment of the FMCSA was that a new safety agency, with expanded resources and funding dedicated to the safety of commercial motor vehicle operations, could advance the safety improvements intended by Congress, as well as achieve the DOT's 10-year goal of reducing motor carrier related fatalities by 50 percent from the 1998 fatality level.

The Safety Improvement Act changed the fundamental manner in which federal authorities regulate motor carriers. Congress identified in the findings section of the Act a list of major problems with the existing federal oversight of commercial vehicles that needed to be corrected. In order to implement these statutory findings and purposes, Congress explicitly enshrined safety as the new agency's mission and highest priority. The Act states that the FMCSA "shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation." Safety Improvement Act, Section 101(a), *codified at* 49 U.S.C. § 113(b). Not only is safety the agency's highest priority, it is the paramount goal which the agency is required to achieve in all of its actions and functions. The statute provides a clear mandate to the FMCSA to advance motor carrier safety as its primary, indeed sole, mission.

As a consequence of the unequivocal wording and clear meaning of the Safety Improvement Act, the agency must justify each of its actions based on its measurable safety impact. In the Act Congress set an overarching standard for motor carrier operations – the highest degree of safety. Establishment of the FMCSA was intended to ensure that this pre-eminent standard of safety is achieved through agency policy choices and other actions. Thus, FMCSA is authorized to improve safety not merely to a greater extent than existed before, but to promote the "highest degree of safety in motor carrier transportation." *Id.* This means that safety must be the rationale for agency plans,

analyses, and programs, and that the FMCSA must demonstrate that it is achieving the highest possible level of safety in its decisions and actions.

## **Motor Carrier Driver Qualifications Exemption Policy**

In light of these events and national concern about safety, Advocates opposes the policy of granting a multitude of exemptions from the federal motor carrier safety regulations including the driver qualification standards. Rather than granting numerous individual exemptions, the agency should focus on scientific research that will establish whether current vision standards accurately measure the level of safety required to ensure safe motor carrier operations, and on research to develop a rational basis for conducting individualized testing. Granting exemptions from the federal motor carrier safety standards (FMCSRs) based on inadequate surrogate criteria does not ensure that deviations from the motor carrier safety standards will provide equivalent or greater levels of safety. Moreover, piecemeal exemptions from otherwise credible and established standards will only serve to undermine the standard itself and increase the pressure to grant an increasing number and variety of exemptions, including exemptions from other safety standards.<sup>1</sup> Unfortunately, FMCSA, and its predecessor agencies, have participated in this devaluation of the existing FMCSRs by accepting partial and incomplete research studies, including the flawed data collection from the Vision Waiver Program, as a valid substitute for the vision safety standard, and by placing the burden on the public to oppose granting these and other exemptions.

## **Driver Information Used in the Safety Determination**

### **Lack of Safety Analysis**

Advocates has reviewed the accompanying background information on each of the drivers as reported by FMCSA. The factual information presented on behalf of each applicant is sparse and no specific safety analyses are supplied. The agency has largely responded to prior criticism that exemption notices provided inconsistent information and often presented subjective or selective information in a one-sided attempt to bolster exemption applications. Advocates acknowledges that, for the most part, the information provided in this notice is presented in a more organized and consistent fashion than in past exemption notices, and is presented, for the most part, in an even-handed manner.

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<sup>1</sup> This pressure to extend the reach of *ad hoc* exemptions, rather than establishing a sound medical and scientific basis for amending the medical qualifications standards in the FMCSRs, is evident from the FMCSA's promulgation of a similar exemption program for drivers with insulin-treated diabetes mellitus. 66 FR 39548 (July 31, 2001).

We also note that the agency now acknowledges, at least tacitly, that the career years of driving experience and total mileage driven are self-reported information that comes from the applicant, *i.e.*, it is “reported” by the applicant, with no indication that this information is independently compiled or verified by the agency.

While these changes are positive and have improved the fair presentation of the text in the agency exemption notices, the more important problems remain including the lack of complete information, reliance on self-reported information, and the omission of in-depth safety analysis to accompany the agency’s safety determinations. The information provided in the notice amounts only to a terse statement of a few highlights on behalf of each applicant without providing any actual analysis or careful scrutiny. Essentially, the information only reflects that each applicant has passed the screening stage for exemption criteria and meets the preconditions for consideration of the exemption application. The agency presents to the public five items of information on each applicant: the current status of the vision in each eye; the reason one eye does not meet the vision requirement; a statement from the examiner who conducted the applicant’s most recent eye exam; the self-reported number of years and miles the applicant claims to have driven; and the results of the state driving record check. The FMCSA presents these bits of information as if they constitute a safety analysis of the applicants’ skill and capability as a driver and of the state driving record. The few facts and other self-reported information presented to the public are, at best, raw data from which the agency has jumped to pre-ordained conclusions without any accompanying in-depth safety analysis.

### **Self-Reported Driving Experience**

For each applicant, the FMCSA notice states the total miles the applicants assert they have driven (either annually or over their lifetime), the number of years they have driven commercial vehicles, the type of vehicle, and the most recent three-year driving record. The public, however, is not generally advised whether the information presented is taken from the driver applications without outside verification, or whether the FMCSA has determined these figures are accurate by other means. The agency now presents the information on years of driving and total miles driven as information that is submitted by the applicant. The unstated implication is that the information is self-reported and has not been verified by the agency, but the agency does not expressly state that this is indeed the case. Since the agency does not expressly state what information has been verified, the public is left to reach its own conclusions.

Moreover, the agency never squarely addresses the issue, in this or other exemption notices, of the reliability of such self-reported information. Especially when so little information is required for screening applicants, the reliance on mostly self-reported information renders the process extremely suspect. Aside from the three-year official state driving record, and the most recent vision examination, all other information is self reported. While much of this information may be accurate, without

independent verification the agency is unable to determine what part of each applicant's self-reported information is accurate, inaccurate, incomplete or fabricated. Problems with the accuracy of self-reported information have arisen in several cases.

In two instances, public comment supplied facts that placed in doubt information reported by the applicants. In each case, information called into question the applicants' completion of the three-year commercial driving experience, one of the criteria for granting the exemption. The agency requires applicants to indicate whether they have driven a commercial motor vehicle for three years immediately preceding the date of the application. Evidently, the agency accepts the self-reported response of the applicant at face value. This information is, apparently, not verified by the agency and, in past proceedings, the agency has granted preliminary determinations based on such self-reported statements. Employment records could verify actual driving over the three years immediately prior to the date of the application, but the agency has not required applicants to submit such records and, if employment records are provided to the agency, those records are not placed in the record for public review.<sup>2</sup> Thus, the agency accepts the applicants' statement in fulfillment of this criterion and only public comment by a recent employer will cast doubt of this assumption. That is precisely what occurred with respect to two applications.<sup>3</sup>

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<sup>2</sup> A check of the applicants' recent state driving history only confirms whether an applicant received citations or was involved in crashes during the three year period covered by most state driving records. The state driving record does not actually verify that the applicant was employed and operating a commercial vehicle during any part or all of that time. A record of citations or crashes while operating a commercial vehicle supplies indirect evidence of actual experience driving commercial vehicles. Ironically however, a clear record with no documented infractions provides no evidence that the applicant operated commercial vehicles in that time frame. Since the agency considers this driving experience to be an essential factor for granting an exemption direct verification of this information is warranted.

<sup>3</sup> In the notice of applications for exemption for docket number FMCSA-2000-7319, the FMCSA represented to the public that one applicant, Mr. J.B. Mazyck, had met the required three-year driving experience criterion apparently repeating the applicant's statement that he "operated straight trucks for 4 years, accumulating 100,000 miles." 65 FR 66286, 66290 (Nov. 3, 2000). However, comments filed by the United Parcel Service (UPS) indicated that the applicant had been driving a commercial motor vehicle for only two years and four months at the time he filed his application for exemption. UPS comments dated Dec. 4, 2000, to docket number FMCSA-2000-7918-3. Prior to being employed as a driver, the applicant performed non-driving duties. *Id.*, attached Declaration of Richard L. Saucier. According to the UPS comment, Mr. Mazyck "occasionally worked as a substitute driver" but his application indicated that he claimed to have been a "'regular temporary driver' in 1995." UPS comments, p. 2 (emphasis in original). Without concurrent driving experience with an employer other than UPS (and apparently none was reported on the application), it appears that the applicant did not meet the agency criteria requiring three years of driving experience immediately prior to the date of application. This issue could have been

These situations provide clear evidence that the agency cannot rely on self-reported information to screen applicants for exemption. There almost certainly are other cases in which information provided by the applicants are inaccurate or untrue. In the two cited cases, the agency obtained more accurate information only because of the diligence of an employer who filed a comment with the public docket in one instance, and because of a subsequent conversation with the applicant in the other. These incidents are a concern and, coupled with other cases in which subsequent information has forced the agency to delay granting applications for exemption, raise questions regarding the thoroughness of agency review and investigation of exemption applications. FMCSA must carefully scrutinize applications and independently verify information with employers and others to ensure the accuracy of self-reported information supplied by the applicants.

In response to criticism raised by Advocates in a prior notice (FMCSA-2000-7006), the FMCSA has stated that only the last three years of driving experience is required under the criteria for an exemption (64 FR 57230, 57232 (Sept. 21, 2000)) and, therefore, only the fact that the applicant has driven a commercial vehicle for the three years prior to the date of the application is actually verified by the agency. As the recent statements of the agency discussed above make clear, the agency does not actually verify whether an applicant has driven over the three years prior to the application. The agency should directly state in the public notice that such information is self-reported and has not been verified by FMCSA. The agency must either verify such information or discount self-reported and unverified information in making safety determinations.

Likewise, the FMCSA has also stated that total miles driven is not a critical criterion and is,

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<sup>3</sup>(...continued)

addressed prior to publication of the agency notice, and prior to the representation to the public that the applicant had four years of driving experience, had the agency independently verified the information and investigated the self-reported claims made in the application,. Upon further review, the agency determined that the applicant did not have the requisite three year driving experience and denied the exemption application. Notice of Final Disposition, 66 FR 13825, 13826 (Mar. 7, 2001).

In a separate instance, the FMCSA has admitted that another applicant did not have the requisite three-year driving experience required to meet the agency criteria for exemption. The agency made a “preliminary” determination to grant a vision exemption to Mr. Kevin Cole on the basis of information he provided indicating that he had driven commercial motor vehicles for the past 30 years. 65 FR 45817, 45819 (July 25, 2000). The agency notice also stated that the applicant’s “official driving record shows no accidents and no convictions of moving violations in a CMV for the past 3 years.” *Id.* Subsequently, the agency learned that Mr. Cole had not driven a commercial vehicle during the three-year period immediately prior to his application, a prerequisite for obtaining an exemption. 65 FR 77066 (Dec. 8, 2000). The agency therefore denied the application, overturning its prior “preliminary” determination to grant the application. *Id.* This case further underscores the need for the FMCSA to verify the self-reported information provided by the applicants for each and every exemption.

therefore, not verified. *Id.* at 57233. Nevertheless, the agency states that the total “[m]ileage is presented as an indication of overall experience with commercial motor vehicles.” *Id.* The agency is presenting self-reported information that it has not verified in order to persuade the public that its determination to grant an exemption is accurate, even though the agency asserts that it does not rely on this information in making its safety determination.

Advocates maintains that the FMCSA’s reliance on, and presentation of, self-reported information regarding years of experience and total mileage driven is inappropriate for two reasons. First, as the agency readily admits, it has not verified the accuracy of the information it accepts as factual and presents to the public. Without independent verification of self-reported information, the agency cannot accept it as reliable for any purpose because it is subject to mistake, exaggeration, and falsehood. Second, although the agency presents the self-reported career mileage driven and years of driving experience submitted by the applicants, the agency only verifies citations and crashes for a three year period. Because the agency does not verify accident and citation history prior to the three-year driving record immediately preceding the application, there is no way to ascertain whether the self-reported driving experience is an accurate indication of a good or a poor driving history. The self-reporting of driving experience alone, when viewed in a vacuum, will always convey a generally good impression since there is no accurate reporting of negative experience, *i.e.*, accidents and citations, for the same period of time and mileage.<sup>4</sup> As an example, a report of ten years and one million miles of driving experience, standing alone, conveys an impression that the applicant has good overall experience, but that impression could be altered dramatically if it were also known that the applicant had amassed several accidents and citations during the first seven years of that experience. Thus, the FMCSA’s reliance and presentation of such one-sided, self-reported information “to give an overall indication of experience,” *id.*, is entirely inappropriate and prejudicial in making safety determinations because it may provide an incomplete picture of the applicant’s driving history, and because it is irrelevant, according to the agency, if the most recent three year driving record “is the critical focus relative to safe driving.” *Id.*

Advocates continues to contend that the juxtaposition of presenting large total number of years of self-reported driving experience (10, 20, and 30 years), as well as a large total number of self-reported miles driven, alongside only the three-year verified driving history creates the misleading impression that all applicants have long safe driving histories when, in fact, this may not be true in certain instances. The clear and possibly misleading implication to be drawn from this presentation is that each applicant had a safe driving record with no accidents, citations, or convictions prior to the last three years. The FMCSA has denied any intention of trying to convey such an interpretation. *Id.* However, the repeated presentation of the driving history information in this manner, regardless of the agency’s

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<sup>4</sup> Even were applicants requested to submit citation and crash information over their career such voluntary, self-reported information would not be reliable unless independently verified.

intent, leaves the impression that each applicant has a record of experience prior to the last three years that is unblemished by an accident or citation. An impression the agency readily accepts as an indication of overall experience with commercial motor vehicles. The agency has taken no action nor made any statement that would deter readers from drawing this conclusion.

The agency cannot have it both ways. Either the prior driving history is part of the safety determination since it presents an indication of the applicant's overall experience, in which case the agency must independently verify the self-reported information and provide comparable accident and citation histories to provide a fair and accurate summary of the experience, or the driving experience prior to the last three years is irrelevant and should not be considered by the agency in its decisionmaking process for any purpose and should not be presented to the public in agency notices.

Moreover, recent experience with state submission of documented accidents and citations that pre-date the three year driving record raise serious concerns about the factual record on which the FMCSA relies in making its determinations to grant vision exemptions. First, the FMCSA should avail itself of state collected driving information including state records older than three-years. So long as driving records are verified as accurate by the state they are relevant and material to the safety determination. In reviewing exemption petitions, the agency should avail itself of all information that is germane to the driving record and safety of the applicants. The FMCSA should request driving histories over extended time intervals from states that retain driving records for more than three years, even if that requires states to search additional databases and archived files. At the very least, this would afford both the agency and the public a more complete and realistic basis for evaluating the information that the agency has stated gives an overall indication of experience.<sup>5</sup> Second, the agency should not publish as fact self-reported information about driving records without authenticating accident and citation information. The agency should consider reporting only driving experience and mileage history for which the agency has obtained a state driving record or which can be verified. Advocates believes that the FMCSA should make every effort to assure the public that exemptions are only granted to

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<sup>5</sup> We realize, however, that the FMCSA is reluctant, if not unwilling, to deny an exemption based on prior driving records submitted by state officials. For example, the California Department of Motor Vehicles submitted to the agency verified evidence that one applicant had been cited for driving on the wrong side of the road in 1995, 5 years prior to his exemption application, and also had been found to be the party most responsible for 2 accidents in 1995 and 1996, 5 and 4 years prior to his exemption application. 65 FR 57232. Although the agency did not deny or rebut these facts it treated them as ancient history and, in granting the exemption, actually cited the applicants' past accident history as a positive sign that the applicants had improved their safety record during the three years immediately preceding the exemption application. *Id.* The fact that such an analysis runs counter to the agency's working premise, that past record is a good predictor of future safety, is not mentioned in the effort to rationalize all relevant information, no matter how negative, in a manner that bolsters the agency's predetermined plan of action.



those drivers with a verified safe driving history of at least five to ten years, not just the most recent three-year period.<sup>6</sup>

The self-reported figure of the total miles driven by each applicant is either stated as a single total for the applicant's entire driving career, or as an annual figure which is intended to be multiplied by the number of years of self-reported driving experience claimed by the applicant. As a result, the FMCSA provides no reliable driving (mileage) exposure data for the last three years covered by the official driving record of each applicant. (Unless it is claimed that the applicants actually drove an equal number of miles each and every year). The agency has dismissed the need for annual exposure data in stating that whether an applicant accumulated accidents and citations under low or high mileage exposure during the critical three year period is "not relevant to the determination of the driver's acceptability." 65 FR 57233.

While Advocates understands that the agency has adopted a strict number of at-fault accidents or serious citations that must appear on the applicant's record in the last three years as its bright line for the safety determination, Advocates believes that, based on information published in the record, the agency should consider a sliding scale standard for drivers with little driving experience. Advocates has observed that while many applicants self-report extensive experience, a number of applicants report only three or four years driving experience with a limited number of miles driven. For applicants reporting relatively low accumulations of mileage and years of experience, but who nevertheless have accidents or citations on their record, exposure should be a factor in making the safety determination. Applicants with less accumulated experience should not be accorded the same degree of driving competence as applicants with longer experience. We base this view on two factors. First, exposure, rather than a predetermined number of accidents or events, is frequently used as an appropriate means of determining safety. In this regard we point out that in other contexts the FMCSA often relies on the fatality rate, rather than on the total number of annual fatalities, as an accurate measure of safety progress in truck-related crashes. Second, the agency has consistently stated that drivers with substandard vision in one eye can adjust over a period of time and, presumably, driving experience. Thus, the agency continually relates the age at which an applicant's impairment occurred implying that the earlier in life it occurred the more time the applicant has had to adjust. It is not, therefore, unreasonable to expect that applicants with limited time and travel exposure may not be qualified for an exemption or should be disqualified at a lower level of accidents/citations. In light of these considerations, the agency should set a minimum mileage limit below which an applicant cannot obtain

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<sup>6</sup> Advocates does not concur with the FMCSA's view that requiring some drivers to submit three year records and other drivers to submit longer records is necessarily arbitrary and capricious. 65 FR 57233. Where state laws vary, and certain states maintain records for longer periods of time, the agency can rely on those laws and official records. Regardless, the agency should assist all states in maintaining these critical safety records for periods of at least five and up to ten years.

an exemption, and a descending scale based on exposure for accident and citation accumulation.<sup>7</sup>

The FMCSA has argued that “[d]efining a required minimum mileage for application would enact a spurious screening standard.” *Id.* Nevertheless, the agency clearly believes that the number of miles driven has value as a measure of safety. “It is part of the basis for establishing whether a program has achieved ‘a level of safety that is equivalent to, or greater than, the level of safety that would have been achieved’ absent the exemption.” *Id.* This, however, is precisely the determination the agency is required to make for each exemption application. Thus, it is no small coincidence that the agency publishes the self-reported total mileage for all applicants and considers total mileage to “give an overall indication of experience.” *Id.* For this very reason, the agency should require applicants to meet a minimum total or average annual mileage, at least for the prior three years, as one of the qualifying criterion for an exemption, just as it requires a minimum of three years driving experience. We note in this regard that the self-reported mileage driven by the applicants varies widely, from as little as 55,000 total miles over 6 years of driving experience for applicant 34, 66 FR 53830, to reported totals equal to or exceeding 4 million miles driving experience for applicants 3 and 6, *id.* at 53827, and applicant 38, *id.* at 53830.<sup>8</sup>

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<sup>7</sup> The FMCSA should be required to verify self-reports of driving mileage and years of experience. Not only should FMCSA attempt to ascertain mileage driven for the last three years, the pertinent period for which the agency checks state driving records, but the agency should also evaluate whether the criteria used in the exemption program is applicable for predicting future safety records based on low cumulative mileage totals over that three year period.

<sup>8</sup> Despite meeting the agency requirements for exemption, a number of applicants reported total career miles driven that, given the reported years of driving experience, yield relatively low annual averages, and two applicants have reported low career total mileage below 100,000 miles driven. By contrast, other applicants have reported millions of total miles driven which indicates, when divided by their reported years of driving, much higher comparative average total annual mileage. The relative exposure of these drivers, even if actual driving conditions were similar, is quite distinct.

Applicant Number	Total Driving Years	Total Career Miles Reported	Annual Miles (Averaged)
1	21	577,000	27,500
11	3	78,000	26,000
17	13	377,000	29,000

(continued...)

### Other Conditions Affecting Safety

Advocates has also argued that the FMCSA has made no effort to scrutinize the conditions under which the applicants have obtained their self-reported driving experience. There is no analysis of the percentage of total miles driven daytime versus nighttime, intrastate versus interstate, or long haul versus short haul. Further, the FMCSA has not made any attempt to distinguish between the kinds of driving routine the applicants experienced based on the type of driving they have done. In its proposed rule on driver rest and sleep for safe operations, 65 Fed. Reg. 25540 *et seq.* (May 2, 2000), the agency distinguishes between five types of drivers and driving regimes based on the type of vehicle driven and work performed: long haul; regional; local-split shift; local; and work vehicle. In response the FMCSA dismisses the conditions under which applicants obtained their driving experience as irrelevant. Although the agency now provides a break down of applicant driving history by certain types of vehicles – straight truck, combination, and bus – where such self-reported information is available, it has not attempted any analysis of whether one type of experience has greater predictive

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<sup>8</sup>(...continued)

27	6	165,000	27,500
34	15	123,000	8,200
35	6	55,000	10,800
3	27	4,000,000	148,000
24	23	3,180,000	138,000
36	30	4,900,000	163,333*

\* We note the incredible achievement in stamina and fortitude that this figure represents. An interstate driver under federal hours-of-service rules driving on a 70-hour over 8-days rotation could accumulate nearly 46 rotations a year for 3,220 driving hours. At an average of 55 miles-per-hour (mph) such a driver could, theoretically, accumulate 177,100 miles in a year. This, of course, would mean that the driver never missed an hour of driving for sickness or vacation, invariably drove at 55 mph from the moment he started driving until the moment he stopped. This feat is all the more impressive not just because applicant #36 would have to have kept up this pace for the full 30 years of his reported driving history, but also because he reported that 2.2 million of his total miles were accumulated while operating straight trucks which, most likely, were driven in more congested local (non-Interstate) traffic conditions requiring the applicant to drive at lower speeds and in stop-and-go traffic.

value for safety than another.<sup>9</sup> Neither does the agency engage in any analysis or comparison of intrastate and interstate operations. The agency simply dismisses the need for further analysis by stating that it “has not assessed the relative value in terms of driving experience between driving these [] types of vehicle configurations.” 65 FR 57233.<sup>10</sup> This, and other failures to provide safety analyses based on specific driving experience and conditions, indicates that the exemption process is not based on a credible, scientific evaluation of individual driving experience but is instead a broad-brush uncritical enterprise aimed at awarding as many exemptions as possible.

The FMCSA continues to emphasize that most exemption applicants do not have an accident or citation (however, only in a commercial vehicle) in the prior three years. In this notice the agency reports that only three of the 37 applicants have citations on their driving records within the last three years, and that none has had an accident within the three year time frame. In past notices, serious violations and accidents have been reported. That appears not to be the case in this group of applicants. While the agency has not had the need to make representations or to otherwise characterize the facts relating to crashes or violations in this instance, the agency has done precisely this in past situations where applicants had crashes or serious violations on their three year driving history. The agency should refrain, in future, from engaging in unilateral defense of an applicant based on the facts unless the agency is prepared to provide the full factual record of the incident to the public. It is inappropriate and prejudicial for FMCSA to proffer the applicant’s version of events, or to provide selective information from documents not in the public record of the agency regulatory proceeding, in an

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<sup>9</sup> FMCSA gives no insight as to how it evaluates, compares and contrasts driving experiences based on operating different types of commercial equipment under distinct driving conditions in which the applicants obtained their experience. For example, applicant #11 reported 78,000 miles of driving experience in just 3 years, an annual average of 26,000 miles, exclusively in straight trucks and, presumably, involving local delivery. Applicant #35, reported 55,000 miles of driving experience in 6 years, an average of just over 8,000 miles per year in both straight trucks and tractor-trailer combinations, and applicant #3 reported 4 million miles of driving in 27 years of experience, an annual average of over 148,000 miles per year, entirely in tractor-trailer rigs. 66 FR 53826 *et seq.*

<sup>10</sup> Yet the FMCSA has reacted positively to protests by the motor coach industry that the agency failed to accurately distinguish the enormous differences in risk and in crash experience between buses and freight trucks in proposing hours-of-service amendments (May 2,000) by indicating in both the agency’s public meetings and later “Roundtable” discussions that the agency will take into account the distinct conditions that differentiate motor coach hours of service requirements from truck drivers in any subsequent hours-of-service proposal.

effort to bolster the application when the underlying information and documents are not available to the public.<sup>11</sup>

### **Statements of Ophthalmologists and Optometrists**

Advocates continues to advance its objection with regard to the FMCSA's reliance on personal statements from ophthalmologists or optometrists as to the applicant's ability to safely operate a commercial motor vehicle. While these specialists may be able to provide information regarding visual capabilities and pathology of the applicant, they are not experts on the driving task and are probably unfamiliar with the requirements for safe operation of commercial motor vehicles. They also are not the health care providers charged with overall commercial driver medical certification. This is particularly true in light of the fact that the vision standard requires better vision than any of the applicants possess and better vision than required by most states for passenger vehicle operation licensure. Moreover, none of these statements indicates that the ophthalmologists or optometrists quoted in the applicant information are familiar with the basis for the current federal vision standard, the types of vehicles that are driven by the applicants, the conditions under which their patients actually operate a commercial vehicle including annual driving mileage, amount of time spent loading vehicles and waiting for loads, amount of nighttime driving performed, weather conditions, over-the-road sleeping conditions (cab berths, motels), etc. None of these specific conditions are taken into account in the statements that are provided for public consumption.

Moreover, the ophthalmologists or optometrists conducting the exams often have no prior familiarity with the patient. While such professionals can attest to a patient's level of visual acuity, they cannot be relied on for the proposition that the applicant has sufficient vision to perform the task of operating a commercial motor vehicle. These professionals have no experience and professional training in commercial vehicle operations on which to properly base a conclusion regarding the applicant's driving ability. Beyond stating that the applicants have been examined, possess a certain level of vision in one or both eyes, and have the requisite medical certificate, these statements of the applicant's qualifications to safely drive a CMV are immaterial. The agency, however, uses the statements of the ophthalmologists and optometrists not just to establish the degree of the applicant's visual acuity, but as testimonials to support the overall inference that the applicant is a safe driver. While the doctors are experts on vision, they are not experts on driving ability and motor carrier

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<sup>11</sup> While the FMCSA has tempered its past efforts to defend the accident records of exemption applicants and, in this particular instance, has no need to engage in such activity, the agency's previous reliance on facts and information that are not part of the record constitutes a violation of procedural due process and is at odds with fundamental rules of informal rulemaking. This tactic should not be relied on in future exemption notices.

operations, and so their opinions on those issues are not persuasive, should not be relied on by the agency, and should not be quoted and recited as fact in the agency's public notice.

### **Misplaced Reliance on the Vision Waiver Program**

The FMCSA's Notice of Petitions and Intent to Grant Applications for Exemption, in concluding that the 37 applicant' petitions for exemptions should be granted, relies in part on the results obtained from the ill-conceived and illegally promulgated vision waiver program. In past notices the agency has repeatedly asserted that "[t]he [] applicants have qualifications similar to those possessed by the drivers in the waiver program." 65 Fed. Reg. 45824. The agency has also asserted that "[w]e believe that we can properly apply the principle to monocular drivers because the data from the vision waiver program clearly demonstrate the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively." *Id.* Advocates rejects this use of information collected from the now-defunct vision waiver program. We also disagree with the agency's oft-stated conclusion "*that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.*" *Id.* (emphasis added). No such conclusion is tenable since the vision waiver program did not use a valid research model nor did it produce results that could legitimately be applied to drivers other than participants in the original vision waiver program.

Indeed, FMCSA was strongly criticized by a number of independent researchers and research organizations for ignoring basic principles of scientific methodology in its conduct of the vision waiver program. In the wake of the federal court decision that invalidated the vision waiver program, *Advocates for Highway and Auto Safety v. Federal Highway Administration*, 28 F. 3d 1288 (D.C. Cir. 1994), the agency admitted the inadequacy of the study methodology and design. "The FHWA [now FMCSA] recognizes that there were weaknesses in the waiver study design and believes that the waiver study has not produced, by itself, sufficient evidence upon which to develop new vision and diabetes standards." 61 Fed. Reg. 13338, 13340 (Mar. 26, 1996).<sup>12</sup> The agency cannot have it both ways – it cannot claim an invalidated and incomplete waiver program as a source for scientifically credible principles for application to the current exemption process.

Most importantly, it is potentially improper and anomalous for the agency to attempt to apply facile generalizations about monocular driver capabilities to a case-by-case evaluation of each exemption applicant. This attempt contradicts the basic premise of the exemption evaluation and of

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<sup>12</sup> See also Qualification of Drivers; Vision Deficiencies; Waivers -- Notice of Final Determination and change in research plan, 59 Fed. Reg. 59386, 59389 (Nov. 17, 1994) ("The agency believes that the observations made by the Advocates, the ATA, the IIHS and others regarding flaws in the current research method have merit").

reviewing each applicant's case virtually *sui generis* and on the unique merits of the facts and circumstances which may qualify or disqualify any given applicant. In fact, the information collected in the vision waiver program is worthless as scientific data, and conclusions regarding the safety of any other individual driver or group of drivers who did not participate in the vision waiver program are neither credible nor scientifically valid. The agency cannot extrapolate from the experience of drivers in the vision waiver program to other vision impaired drivers who did not participate in that program. This point was made repeatedly to the FHWA in comments to the numerous dockets spawned by the agency's determination to grant vision waivers. It was made quite clear at the time the agency undertook to grant waivers to drivers in the vision waiver program that the individualized information accumulated in that program could not be used to serve any other purpose. Information collected in that program has been comprehensively repudiated as a basis for drawing any conclusions about non-participant drivers. The FMCSA, therefore, is obligated to re-evaluate the merits, and reconsider its preliminary determination to grant exemption petitions without any reliance on, or reference to, the experience of the drivers who participated in the vision waiver program.

Moreover, the agency asserts that drivers who do not meet the existing vision standard requirements can "adapt to their vision deficiency and operate safely." *Id.* Yet the FMCSA provides no basis on which to assert that drivers in the original Vision Waiver Program adapted to their vision deficiency or how this was accomplished. More important to the current circumstance, however, is the fact that no evidence of such adaption is presented by or on behalf any applicant for exemption. Proof of this adaptive practice or behavior is crucial to the agency's argument and safety determination, yet none is presented.

## **The Legal Standard for Exemptions**

### **Burden of Proof**

The Secretary of Transportation must meet a very exacting legal standard in order to grant an exemption to the FMCSRs. The statute requires the Secretary, prior to issuing an exemption, to determine that the exemption is "likely to achieve a level of safety that is equivalent to, or greater than, the level [of safety] that would be achieved absent such exemption." 49 U.S.C. § 31315(a).<sup>13</sup> The statute not only expressly states the standard to be achieved – equal or greater safety – but also imposes the burden of proof that the Secretary must meet in making safety determinations to grant exemptions.

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<sup>13</sup> Originally enacted as Section 4007 of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), Pub. L. 105-78, 112 Stat. 107 (1998).

The statute limits the authority of the Secretary to grant exemptions only to those that are “likely” to result in a safety outcome that is at least equal to the level of safety that existed before the exemption was issued. The use of the word “likely” means that the result must be probable.<sup>14</sup> This is a high legal standard of proof, comparable to the requirement that parties seeking a preliminary injunction must establish a “likelihood” of success on the merits.<sup>15</sup> More than a mere preponderance of the evidence in the record must support the proposition that granting the exemption will yield equal or greater levels of highway safety. While the evidence need not be unanimous, an overwhelming majority of the evidence must unequivocally support the proposition that a particular exemption will, in all probability, result in equal or greater safety. Thus, the Secretary does not have discretion to issue exemptions when the evidence is unclear, evenly divided, or otherwise falls short of establishing that an equal or greater safety result is probable.

Advocates is convinced that the FMCSA has not met its burden of proof based on the administrative record before the agency. While there is a mix of scientific data and research and other information in the record, the agency cannot assert that the evidence proves that ITDM exemptions will probably result in an equivalent or greater level of highway safety. Objective evaluation of the scientific evidence reveals that the claims made by the agency regarding the safety of ITDM drivers is not supported by the research and that the research findings are not nearly as clear and unequivocal with respect to the safety result as the agency has asserted. While there may be some evidence in the record to support the agency view, the majority of the evidence does not support the conclusion that granting numerous exemptions to individuals with ITDM to drive in interstate commerce will probably result in equivalent or greater levels of safety than would exist if the program were not established. On this record, therefore, the evidence does not indicate that ITDM exemptions are “likely” to result in equal or greater highway safety and, therefore, a program to grant such exemptions should not be adopted.

**The Legal Standard For Issuance of Exemptions Is Not More Flexible Than the Former Legal Standard that Governed the Issuance of Waivers**

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<sup>14</sup> “1. Possessing or displaying the qualities or characteristics that make something probable.” American Heritage Dictionary of the English Language, 3<sup>rd</sup> ed. (1992); “1. probably or apparently destined . . . 2. Seeming like truth, fact, or certainty; reasonable to be believed or expected[.]” Random House Dictionary of the English Language, Unabridged Edition (1971).

<sup>15</sup> See likelihood-of-success-on-the-merits test, Black’s Law Dictionary, 7<sup>th</sup> ed. (1999) (“The rule that a litigant who seeks a preliminary injunction, or seeks to forestall the effects of a judgment during appeal, must show a reasonable probability of success in the litigation or appeal”).



As already noted, the statutory language requiring a safety result that is equivalent to, or greater than, the previously existing level of safety, sets an extremely high safety standard. This standard is no less stringent than the former statutory standard that required waivers to be consistent with safety. FMCSA has, nevertheless, asserted that the current statutory language permitting the issuance of exemptions affords the agency “greater flexibility and discretion to deal with exemptions than the previous standard.” 66 FR 39551 (citation omitted). The present legal standard, however, is not a lower or more flexible standard than the previous statutory requirement that waivers must be “consistent with . . . the safe operation of commercial motor vehicles.”<sup>16</sup> The express wording of the current statute requires that highway safety be maintained at the level of safety that existed prior to the granting of the exemption. Any attempt to gloss this standard as a less demanding or more flexible safety standard than the preceding statutory standard is a misinterpretation of the unambiguously clear statutory language.

Not only is the legal standard for granting exemptions not less stringent, the opposite is actually the case. A comparison of the wording of the two provisions reveals that the current exemption provision actually imposes a stricter standard than was included in the prior waiver provision. The standard for granting exemptions is more stringent in two ways. First, the prior waiver provision language only required a result that was “consistent” with the public interest and “the safe operation” of commercial motor vehicles.<sup>17</sup> That language did not necessarily require an outcome resulting in equivalent or greater safety. The terminology of the previous waiver provision was undefined in the statute and could have been interpreted to mean that something less than an equivalent level of safety would have been acceptable.<sup>18</sup> It is evident that the intended result required by the current statute,

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<sup>16</sup> Compare 49 U.S.C. § 31315(a) (“is likely to achieve a level of safety that is equivalent to or greater than, the level of safety that would have been achieved”), with 49 U.S.C. § 31136(e) (1992) (“consistent with the public interest and the safe operation of commercial motor vehicles”).

<sup>17</sup> 49 U.S.C. § 31136(e) (1992). The waiver provision was originally codified at 49 U.S.C. App. § 2505(f), and was redesignated as 49 U.S.C. § 31136(e) in the 1994 recodification of title 49.

<sup>18</sup> In fact, the appellate court that decided *Advocates for Highway and Auto Safety v. Federal Highway Administration*, 28 F.3d 1288 (1994), did not interpret the legal standard for waivers as imposing an absolute standard that safety could not be reduced by issuance of a waiver. Rather, the Court accepted the agency’s view that waivers could only be issued if “there will ‘not be any diminution of safety resulting from the waiver.’” *Id.* at 1294. This statement of the applicable standard was the agency’s formulation and is identical (in effect if not terminology) to the present standard for granting exemptions. Thus, the newer exemption standard – requiring “equivalent to or greater” level of safety –

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equivalent or greater safety, imposes the same if not an even higher level of safety than the prior requirement which only limited waivers to those that were “consistent” with the safe operation of commercial vehicles.

Second, the prior statutory provision did not establish any legal standard of proof on which to base the safety determination to issue a waiver. Arguably, as long as there was some minimum factual support in the record on which to base the issuance of a waiver, and which established a reasonable basis for agency action, the waiver could have been issued.<sup>19</sup> The Court in *Advocates* found that there

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<sup>18</sup>(...continued)

imposes at least the same legal burden (if not a higher one) than the prior standard for waivers. As a consequence, the exemption standard cannot be considered more flexible or as providing greater discretion than the standard that applied to the issuance of waivers.

The issue in *Advocates* did not, however, revolve around the stringency of the legal standard. The Court’s actual ruling was that the agency had no evidence to support issuing waivers and that, in reality, the record was “devoid of empirical support in the record.” *Id.* It was not the case that the legal standard was too high, but rather that the agency had no factual evidence of any kind. Thus, the waiver program before the Court would not have passed muster under any legal standard.

<sup>19</sup> *Advocates* disagrees with the stance adopted first by FHWA, and now FMCSA, that the waiver provision imposed an absolute safety standard that the agency could never meet. The waiver statute limited authority to issue waivers only to those waivers that were in the public interest and consistent with the safe operation of commercial vehicles. Even if this standard required that waivers could not result in lower levels of highway safety, then it is no different from the standard in the present exemption statute. The wording of the current exemption statute, by requiring exemptions to result in equivalent or greater safety, impose the same standard. The major difference then, between the two statutes is that the waiver provision required no specific burden of proof or legal quantity of factual evidence to support the determination to issue a waiver. Under the terms of the waiver provision the agency could support its determination, as any other regulatory decision, so long as it had some evidence in the record to indicate that the issuance of a waiver would not diminish safety. By contrast, the current exemption provision now imposes a distinctly greater burden of proof on the agency before it can issue an exemption. The agency cannot now simply rely on some evidence in the record to support its determination the an exemption will result in equivalent or greater levels of highway safety; the agency must now show that it is likely, *i.e.*, probable, that the result will be an equivalent or greater level of safety. Thus, while the agency has the same ultimate goal, *viz.*, no less safety, it must now satisfy a higher legal burden of proof.

To the extent that the FMCSA believes that the use of the term “likely” in the statute indicates that the current legal standard for granting exemptions provide more flexibility and discretion than the

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was no evidence to support the agency waiver program. Under such a standard, the administrative record on which the proposed diabetic waiver program rests might have been sufficient for the adoption of the program and the issuance of ITDM exemptions. But the current statute requires enough evidence in the record to establish that the issuance of an exemption will “likely” result in equal or greater safety. As previously shown, this demands that the record establish that the outcome of equal or greater safety is probable, not just possible. This imposes a burden of proof not found in the prior waiver provision. Far from reducing the legal burden on the Secretary, or making the issuance of exemptions under current law either more flexible or less stringent than was applicable for the issuance of waivers, requiring that equivalent or greater safety be the “likely” result actually raises the evidentiary bar for the issuance of exemptions as compared to waivers.

Thus, not only does the wording of the statute prevent any interpretation that the exemption requirement is more lax than the waiver provision, but the addition of an evidentiary standard requiring a high level of proof in the record contradicts the agency’s position that exemptions are subject to a lesser legal or evidentiary standard than was required to issue waivers.

### **The Legislative History Does Not Support the Agency’s Position**

The FMCSA has asserted, nevertheless, that the legislative history of the exemptions provision indicates that the Secretary has greater leeway to grant exemptions. The agency relies on selective portions of the legislative history of the current provision, citing H.R. Conf. Rep. No. 550, 105<sup>th</sup> Cong., 2d Sess., at 489 (1998). 66 FR 39551. This contention asserts that Congress sought to overturn the Court of Appeals decision in *Advocates*, which the agency has argued limited the ability of the Secretary to issue waivers. See agency discussion in FMCSR Technical Amendments Final Rule, 65 FR 25285, 25286, May 1, 2000 (FMCSA); FMCSR, Waivers, Exemptions, and Pilot Programs, Rules and Procedures, Interim Final Rule, 63 FR 67600, 67601, Dec. 8, 1998 (FHWA). According to this history in order “[t]o deal with the [Court’s] decision, this section substitutes the term ‘equivalent’ to describe a reasonable expectation that safety will not be compromised.” H.R. Conf. Rep. No. 550, at

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<sup>19</sup>(...continued)

previous standard for issuing waivers, Advocates disagrees. It appears that FMCSA reads the term “likely” to permit some “wiggle room” in making its determinations as to whether the safety outcome will result in equivalent or greater safety. As previously stated, the use of the term “likely” actually increases the legal and factual burden on the agency without in any way reducing the ultimate requirement to ensure that exemptions will not diminish highway safety.

489-90.<sup>20</sup> The agency cannot, however, rely on this statement to support its position of a lower legal standard for exemptions for two reasons.

First, any reading of this legislative history to indicate a weakening of the legal burden and an attempt to override the Court of Appeals decision in *Advocates* must be squared with the express wording and meaning of the statutory language as enacted. The exemption statute expressly states that the Secretary may grant exemptions if they are “likely” to result in equivalent or greater safety; there is no implication that less safety or safety flexibility is intended. The term 'equivalent' means "equal, as in value, force, or meaning"<sup>21</sup> and is "corresponding or virtually identical esp. in effect or function."<sup>22</sup> Nothing whatever in the use of the word 'equivalent' as a substitute for the expression 'consistent with,' used in the prior statutory provision, connotes or implies any increased flexibility, diminution, or other abridgement of the enacted safety standard for granting and administering exemptions. Moreover, even according to the cited legislative history, the term 'equivalent' was selected by Congress not to undermine safety or to relax a strict interpretation of the prior legal standard. The legislative history actually supports the view that Congress intended exactly the contrary purpose, *viz.*, to provide "a reasonable expectation that **safety will not be compromised**." *Id.* (Emphasis supplied).

Second, the cited legislative history is actually taken from the Senate amendment to the original House bill. The statement referring to the decision in *Advocates* was not restated or reiterated in the Conference Report substitute that supplanted the Senate version. *Id.* It is the Conference Report substitute, not the prior Senate amendment gloss that was replaced by the Conference Report language, that represents the controlling legislative history accompanying the law. Indeed, the Conference Report substitute, while stating that it includes basic provisions of both the House and Senate versions, makes no mention of the cited court case nor does it intimate that any increased discretion provided to the

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<sup>20</sup> In fact, the legislative history contained in H.R. Conf. Rep. No. 550 does not indicate any Congressional intent to permit the agency to accept less safety as a consequence of waivers or exemptions than was permitted through the application of a "consistent with safety" determination that was required for waivers. Moreover, any diminution of safety, such as through an increase in crashes and/or crash severity, clearly would violate the plain meaning of the current statutory text which requires that any and all awarded waivers and exemptions be likely to result in motor carrier operations which generate "equivalent or greater safety."

<sup>21</sup> American Heritage Dictionary of the English Language, 3<sup>rd</sup> ed. (1992).

<sup>22</sup> Webster's New Collegiate Dictionary 10<sup>th</sup> ed. (1997).

Secretary for granting exemptions.<sup>23</sup> The views expressed in the Senate report are not explicitly adopted or restated in the Conference substitute. As a result, there is little value in the Senate Report statements regarding the decision in *Advocates*. Even so, and as discussed above, statements in legislative history are fundamentally worthless to the extent that they openly conflict with the clear intent of Congress expressly stated in the statute. In this instance, the strained interpretation relied upon by FMCSA is directly countermanded by the express wording of the statute.

### Supreme Court Decision on Vision Waivers

In *Albertsons, Inc. v. Kirkingburg*, No. 98-591 (June 23, 1999), the U.S. Supreme Court specifically rejected vision waivers<sup>24</sup> as a regulatory modification of the vision standard in the Federal Motor Carrier Safety Regulations (FMCSRs). “[W]e think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard. . . .” *Albertsons, slip op.* at 15. The Court refuted the view that “the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule [vision standard] had been modified by some different safety standard made applicable by grant of a waiver.” *Id.* The Court reached this opinion based on the FHWA’s own assertion that it had no facts on which to base a revised visual acuity standard either before *or after* the vision waiver program. “The FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistently with public safety.” *Id.* at 19. According to the Court, “there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter.” *Id.*

In making these statements and reaching its conclusion, the Supreme Court relied heavily on the administrative record compiled and the decision of the Court of Appeals rendered in *Advocates for*

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<sup>23</sup>In fact, the rigorous controls included in the exemption portion of section 31315 are a paradigm shift in the level of procedural adequacy required to be observed by FMCSA in reviewing the granting of exemptions. In light of the fact that Congress was aware that additional controls on the authority to grant exemptions were part of the legislation, and that the goal of the exemption process was to only grant exemptions that would achieve equivalent or greater safety, it cannot be argued that the current provision provided the agency more flexibility or directly overturned the decision in *Advocates*. That is most likely the reason that the language in the Senate Report was not included in the Conference Report substitute.

<sup>24</sup>The Court was adjudicating the issuance of a waiver pursuant to 49 U.S.C. § 31136(e), which has since been transmuted into exemptions under 49 U.S.C. § 31315.

*Highway Safety v. FHWA*, 28 F.3d 1288 (CA DC 1994). The Supreme Court summed up the agency's basis for the Vision Waiver Program as follows:

[T]he regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way. The waiver program was *simply an experiment with safety*, however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards.

*Albertsons*, slip op. at 20 (emphasis added) (citation omitted).

Indeed, although the *Advocates* case was not before it, the Supreme Court went out of its way to endorse the decision reached by the Court of Appeals, noting that it was "hardly surprising that . . . the waiver regulations were struck down for failure of the FHWA to support its formulaic finding of consistency with public safety. See *Advocates for Highway Safety v. FHWA*, 28 F.3d 1288, 1289 (CA DC 1994)." *Id.*, at note 21. The Court went on to emphasize that the agency has tried to have things both ways.

[The agency] has said publicly, based on reviews of the data collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. [Citations omitted]. It has also noted that its medical panel has recommended 'leaving the visual acuity standard unchanged,' see 64 Fed. Reg. 16518 (1999) [citations omitted], a recommendation which the FHWA has concluded supports its 'view that the present standard is reasonable and necessary as a general standard to ensure highway safety.' 64 Fed. Reg. 16518 (1999).

*Id.*

The Supreme Court concluded that employers do not have the burden of defending their reliance on existing safety standards in the FMCSRs in the face of FHWA waivers. According to the Court, were it otherwise,

[t]he employer would be required in effect to justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government's own wheel when the Government merely had begun an experiment to provide data

to consider changing the underlying specifications.

*Id.* at 22.

It is clear from the Supreme Court's opinion that whatever validity the Vision Waiver Program may have had (and Advocates does not concede that it ever had any scientific validity), was based on the premise of collecting empirical data in order to revise the visual acuity standard. This was the announced purpose of the program and the basis for data collection methodology. The Vision Waiver Program was not conceived or designed to serve any other legitimate scientific purpose. Since the program was subsequently discontinued by court order, and since the agency has acknowledged that the data collected is not sufficient to revise the existing standard, there is no appropriate use to which the data can properly be applied, including as a basis for justifying the grant of vision exemptions. Advocates does not accept, and neither FHWA nor OMCS has proven, that data collected about drivers who voluntarily participated in the Vision Waiver Program can be used as the basis for granting exemptions (waivers) to drivers who did not participate in that program. There is no credible basis for making such an extrapolation, particularly when the FMCSA claims it is making individual assessments of each applicant. The Supreme Court's discussion in *Albertsons* supports Advocates' view that the agency cannot fairly and credibly rely on data collected in the discredited Vision Waiver Program. The Supreme Court was eloquent in its conclusion that vision waivers are not a credible substitute for the underlying standard. Since the data collected in the program cannot be used for its intended purpose to revising the vision standard, it cannot and must not be used for any other legal, regulatory, or policy purpose, including the justification for issuing exemptions from the vision standard.

In previous notices regarding the Vision Waiver Program and vision exemptions, FHWA persistently invoked the Americans with Disabilities Act (ADA) as the rationale for the Vision Waiver Program and the subsequent issuance of vision waivers, now referred to as exemptions. During the Vision Waiver Program litigation in federal court, and even after the Court of Appeals nullified that program, the FHWA steadfastly maintained that the issuance of vision waivers was required in order to comply with the ADA. Advocates has long contended that the ADA does not override existing safety standards contained in the FMCSRs, and that the issuance of waivers is not a viable means of addressing requirements in the vision standard and other medical and physical qualifications for commercial drivers that are purported to be overly stringent. We were gratified to read that OMCS admitted that the ADA "does not apply to the Federal regulations." 64 Fed. Reg. 66965; *see also* 64 Fed. Reg. 66965. Thus, the OMCS at least agreed that the vision waiver program and other programs of its kind, including waivers and exemptions, are not statutorily required by the ADA. This admission should lead the agency to reevaluate its position under the lower court decision in *Rauenhorst v. U.S. DOT, FHWA*, 95 F. 3d 715 (1996). That decision, which predates the U.S. Supreme Court opinion in *Albertsons*, was predicated on the assumption that the ADA applied to federal safety and medical qualification standards. Since the OMCS admitted that this is not the case, and in light of the Supreme

Court decision more narrowly interpreting the ADA, the FMCSA should reassess its policy of granting numerous exemptions to the vision standard.

While it may be technically correct that the decision in *Albertsons* does not “*directly* affect the exemption program,” 64 Fed. Reg. 66965 (emphasis added), it is very clear that from a factual standpoint the Court disdained the agency grant of waivers in such an arbitrary and capricious manner. Clearly, the Supreme Court did not place much credence in the waivers issued by FHWA since it determined that employers subject to the federal requirements were free to ignore the waivers and did not have to hire drivers who held waivers. The common sense impact of the Court’s decision is equally applicable to exemptions issued by the FMCSA. Advocates has always maintained that the appropriate procedure is to revise the standards based on relevant and sufficient medical and safety information. In *Albertsons*, the Supreme Court unanimously agreed with this position.

In reaching its decision, the Supreme Court discussed the legislative history of the ADA. As Advocates had previously contended, the Court concluded that “[w]hen Congress, enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law.” *Albertsons, slip op.* at 18. The Court cited the understanding of Congress that “ ‘a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of the legislation.’ S. Rep. No. 101-116, pp. 27-28 (1998) [sic].” *Id.* The relevant Congressional committees did request that the Secretary of Transportation conduct a thorough review of knowledge about disabilities and make required changes within 2 years of enactment of the ADA. While FHWA and OMC failed to conduct such a review of the FMCSRs and medical qualifications in general, a subsequent review of the vision standard by FHWA found no empirical evidence on which to base any change in that standard. Thus, the waiver program did not fulfill the Congressional request to make necessary changes to the standards following a review because “the regulations establishing the vision waiver program did not modify the general visual acuity standards.” *Albertsons, slip op.* at 18. It cannot be contended that Congress, in enacting the ADA, sought to undermine existing safety standards on an *ad hoc* basis by permitting the employment of persons who do not meet the extant safety requirements mandated by the Department of Transportation. As a result, the Supreme Court concluded that it

is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government’s sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation’s application according to its own terms.

*Id.* at 22.



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In light of the decision in *Albertsons*, the FMCSA must revisit the position previously taken by both FHWA and OMCS, re-evaluate the significance of the lower court decision in *Rauenhorst v. U.S. DOT*, and reconsider the agency's policy of issuing experimental vision exemptions based on surrogate criteria for visual performance requirements.

**ORIGINAL SIGNED**

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Henry M. Jasny  
General Counsel